

Montana Water Court
PO Box 1389
Bozeman, MT 59711-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE RIVER DIVISION
TONGUE RIVER, ABOVE & INCLUDING HANGING WOMAN CREEK (BASIN 42B)
INTERLOCUTORY DECREE

* * * * *

CLAIMANT: United States of America (Bureau of Land
Management)

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 42B-0014-I-2023

42B 30139759

42B 30139766

42B 30142686

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

The above-captioned claims appeared in the Interlocutory Decree for the Tongue River, above and including Hanging Woman Creek (Basin 42B) issued on January 12, 2022. The claims did not receive objections, counterobjections, or notices of intent to appear, but did receive issue remarks.

FINDINGS OF FACT

42B 30139759

1. Claim 42B 30139759 appeared in the Basin 42B Interlocutory Decree as a claim for stock drinking directly from the south fork of Canyon Creek in Government Lots 2 and 3 of Section 2, T7S, R40E, Big Horn County.

2. The claim received the following issue remarks:

CLAIMED PLACE OF USE NO. 2 COULD NOT BE CONFIRMED FROM AVAILABLE DATA.

CLAIMED POINT OF DIVERSION NO. 2 COULD NOT BE CONFIRMED FROM AVAILABLE DATA.

3. Point of Diversion ID No. 2 and Place of Use ID No. 2 were decreed as Government Lot 3 of Section 2, T7S, R40E, Big Horn County.

4. On March 23, 2023, the United States filed information resolving the point of diversion and place of use issue remarks. (Doc.¹ 5.00).

5. Based on the information provided by the United States, the claimed source does not cross Government Lot 3 of Section 2, T7S, R40E, Big Horn County.

6. The United States requested removal of Government Lot 3 of Section 2, T7S, R40E, Big Horn County from the point of diversion and place of use.

42B 30139766

7. Claim 42B 30139766 appeared in the Basin 42B Interlocutory Decree as a claim for stock drinking directly from Youngs Creek in the NESE of Section 25, T9S, R38E, Big Horn County.

8. The claim received the following issue remarks:

THE CLAIMED PLACE OF USE COULD NOT BE CONFIRMED FROM AVAILABLE DATA.

THE CLAIMED POINT OF DIVERSION COULD NOT BE CONFIRMED FROM AVAILABLE DATA.

9. The United States withdrew claim 42B 30139766. (Doc. 5.00).

¹ "Doc." numerical references correlate to case file docket numbers in the Water Court's Full Court case management system.

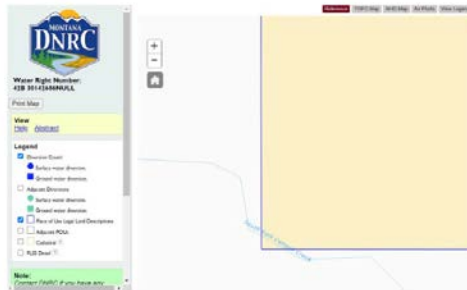
42B 30142686

10. Claim 42B 30142686 appeared in the Basin 42B Interlocutory Decree as a claim for stock drinking directly from the south fork of Canyon Creek in the NWSW of Section 5, T7S, R41E, Rosebud County.

11. The claim received the following issue remarks:

THE CLAIMED PLACE OF USE COULD NOT BE CONFIRMED FROM AVAILABLE DATA.
THE CLAIMED POINT OF DIVERSION COULD NOT BE CONFIRMED FROM AVAILABLE DATA.

12. Based on the maps provided by the United States, the south fork of Canyon Creek crosses the NWSW of Section 5, T7S, R41E, Rosebud County.



Notice-Type Issue Remarks

13. All three claims received the following notice-type issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 42B DECREE ISSUED 02/28/2008.

14. The remark served its notice purpose.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

CONCLUSIONS OF LAW

42B 30139759

1. Based on Rule 17(c), W.R.Adj.R., Government Lot 3 of Section 2, T7S, R40E, Big Horn County should be removed from the point of diversion and place of use for claim 42B 30139759. This modification resolves the point of diversion and place of use issue remarks, and the remarks should be removed from the claim abstract.

42B 30139766

2. Based on Rule 17(c), W.R.Adj.R., claim 42B 30139766 should be dismissed.

42B 30142686

3. The point of diversion and place of use issue remarks do not overcome the prima facie status of claim 42B 30142686. The claimed source crosses the point of diversion and place of use. The point of diversion and place of use issue remarks should be removed from the claim abstract, and the elements should remain as they appeared in the Basin 42B Preliminary Decree.

Notice-Type Issue Remarks

4. The notice-type issue remark described in Finding of Fact No. 13 served its notice purpose and should be removed from the claim abstracts.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

Mark Widerschein, Trial Attorney
NRS-ENRD US DOJ
PO Box 7611
Ben Franklin Station
Washington, DC 20044-7611
(202) 532-5803
mark.widerschein@usdoj.gov
MontanaBasins.ENRD@USDOJ.GOV

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TONGUE RIVER, ABOVE & INCLUDING HANGING WOMAN CREEK
BASIN 42B

Water Right Number: 42B 30139759 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: MARCH 16, 1938

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SOUTH FORK CANYON CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	2	SWNWNE	2	7S	40E	BIG HORN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		2	SWNWNE	2	7S	40E	BIG HORN

Remarks:

BLM FILED ELECTRONIC CLAIMS. THIS CLAIM REFERENCES BLM CLAIM ID BLM401 AND GRAZING ALLOTMENT MT10048.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TONGUE RIVER, ABOVE & INCLUDING HANGING WOMAN CREEK
BASIN 42B

Water Right Number: 42B 30139766 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: DISMISSED

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date:

Type of Historical Right:

Purpose (use): STOCK

Flow Rate:

Volume:

Source Name: YOUNGS CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TONGUE RIVER, ABOVE & INCLUDING HANGING WOMAN CREEK
BASIN 42B

Water Right Number: 42B 30142686 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: MARCH 16, 1938

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SOUTH FORK CANYON CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSW	5	7S	41E	ROSEBUD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	5	7S	41E	ROSEBUD

Remarks:

BLM FILED ELECTRONIC CLAIMS. THIS CLAIM REFERENCES BLM CLAIM ID BLM3328 AND GRAZING ALLOTMENT MT10014.